In Error to the Supreme Court of the State of South Dakota

REPLY BRIEF OF PLAINTIFFS IN ERROR

Martin & Mason,
Attorneys for Plaintiffs in Error

20388

Supreme Court of the United States

OCTOBER TERM, 1903

No. 220

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, deceased; Elizabeth Wilsey, *et al.*,
- - - *Plaintiffs in Error*

vs.

THE HORSESHOE MINING & MILLING COMPANY, JOSEPH M. THOMAS, *et al.*,
- - - *Defendants in Error*

In Error to the Supreme Court of the State of South Dakota

REPLY BRIEF OF PLAINTIFFS IN ERROR

MARTIN & MASON,
Attorneys for Plaintiffs in Error

Supreme Court of the United States

OCTOBER TERM, 1903

No. 220

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, deceased; Elizabeth Wilsey, *et al.*,
- - - *Plaintiffs in Error*

vs.

THE HORSESHOE MINING & MILLING COMPANY, JOSEPH M. THOMAS, *et al.*,
- - - *Defendants in Error*

In Error to the Supreme Court of the State of South Dakota

REPLY BRIEF OF PLAINTIFFS IN ERROR

I

THIS COURT'S JURISDICTION.

Defendants in error urge the dismissal of the writ of error for two reasons: (A) Because the judgment of the trial court was based upon three sufficient grounds two of which presented no Federal question; and though the opinions of the court of last resort show that its decree affirming the lower court's judgment was based solely upon the ground presenting a Federal question,

yet those opinions are not part of the record and must be disregarded in ascertaining what was actually decided by *the state supreme court*; and (B) Because, as they assert, it was the defendant and not the plaintiffs in error who set up a title under the United States statutes and the decision of the state court was in favor of the title so set up, and not adverse to any title claimed by plaintiffs in error.

A

It is not the judgment of the trial, but the highest court of the state, to-wit, the Supreme Court, that is subject to review in this Court. What, then, was the judgment of the Supreme Court?

If the opinions of the supreme court of the state can be examined in order to determine that question, it is perfectly apparent that the decision of that court was based entirely upon the Federal question as to the validity of forfeiture proceedings. In its first opinion reported in 9 S. D., 636.) the supreme court of the state says: "It is claimed by the plaintiffs that the re-location was a fraud upon them; but in the view we take of the case, the only material question to be considered is as to the validity of Havens' proceedings in his attempt to acquire the half interest of Wilsey to the "Golden Sand" lode. * * * * * If, therefore, the proceedings taken by Havens divested the estate of Wilsey of its title then the defendants obtained a good title to the whole claim under the 'North' lode location." (Trans. p. 24, fol. 45.)

In its decision on the second appeal (reported in 15 S. D., 124.) the supreme court of the state says: "An extended statement of the facts will be found in our form-

er decision, wherein it was held that notices of forfeiture addressed to Rufus Wilsey, his heirs, administrators and to all whom it may concern were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual for the reason that they were not published during the entire period prescribed by the Federal statutes." (Trans. p. 21, fol. 40). The court then discussed the question of publication, found against the contention of plaintiffs in error, and affirmed the judgment of the lower court.

It is therefore, clear that the judgment of the court of last resort was, in reality, based solely upon the decision of a Federal question.

The only question that remains then is, can the opinions of the state court, which are made a part of the transcript, be examined in order to ascertain that its decision was based solely on a Federal question? This question should be regarded as settled.

The question was first raised since the act of 1867 in the case of Murdock vs. City of Memphis, 20 Wall, 633.

Later, in a case arising in Illinois, where the state statute required that the justices of the supreme court should deliver and file written opinions in cases submitted to it, and that such opinions shall also be spread at large upon the recods of the court, this Court, after quoting from Murdock vs. City of Memphis, above cited, says: "We cannot, therefore, doubt that in the existing state of the law, it is our duty to examine the opinion of the supreme court of Illinois in connection with other portions of the record for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right title or im-

munity under the constitution or laws of the United States."

Gross v. United States Mortgage Co. 108 U. S. 485; 2 Supt. Ct. Rep. 945.

Again, in a case from Iowa, where the state law simply required the filing of the supreme court's opinions before judgment is rendered, this Court held: "But if we look to the opinions, which under the laws of Iowa must be filed before a judgment is rendered, and which, when such is the law, may certainly be looked at to aid in considering doubtful expressions in a decree, it is shown unmistakably that the decision was put on that ground alone." Citing Gross v. United States Mortgage Co. supra.

Adams v. Burlington & M. R. R. Co., 112 U. S., 129 5 Sup. Ct. Rep. 80.

In a case arising in New York it was said, without referring to or quoting any New York statute as to filing or recording of the opinion of the court of appeals: "But in view of what was said in Murdock vs. Memphis, 20 Wall. 590, in Gross v. United States Mortgage Co., 108 U. S. 477 and in Adams Co. v. Burlington & M. R. R. Co., 112 U. S. 123, we think that we are at liberty to look into the opinion of the court of appeals, a copy of which duly authenticated is transmitted to us with the record in compliance with our Eighth Rule for the purpose of aiding in determining what was decided by that court."

Fire Ass'n vs. State of N. Y., 119 U. S., 116; 7 Sup. Ct. Rep. 111.

In a case from Michigan where the constitution simply requires that the opinions of the supreme court shall be in writing signed by the judges concurring therein and filed by the clerk, such an opinion was examined in

order to ascertain whether a Federal question was therein decided.

Detroit City Ry. Co. vs. Guthard, 114, U. S., 133, 137; 5 Sup. Ct. Rep. 811.

"The statute of Kentucky requires written opinions to be delivered by the court of appeals in all cases and to be recorded by its clerk. * * * * * By the settled course of decision under the existing judiciary acts of the United States, this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court." Citing cases supra.

Kreiger v. Shelby R. Co., 125 U. S., 44; 8 Sup. Ct. Rep., 755.

"In respect of the supreme court, it is provided by section 5 of the Code of Civil Procedure of Washington that 'in the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated'; and by section 68 and 73 it is made the duty of its clerk to record its proceedings, and enter its orders, judgments, and decrees. And the thirteenth rule of the court provides that 'all opinions of the court shall be recorded by the clerk in a well-bound volume and the original filed with the papers in the case.' 2 Wash. St. 689,

It is the settled course of decision that this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court. Kreiger v. Railroad Co. 125 U. S., 39, 8 Sup. Ct. 752."

Dibble v. Bellingham Bay Land Co., 163 U. S., 69; 16 Sup. Ct. Rep., 941.

It is provided by rule twenty-five of the supreme court of South Dakota as follows: "Opinions of the court

shall be reduced to writing and filed with the clerk in open court."

The statutes contain the following provisions: "He (clerk of the supreme court) must not allow any written opinion of the supreme court to be removed from his office, except by the reporter; but shall permit anyone to examine or copy the same."

Revsd. Political Code 629.

"He (clerk of the supreme court) shall keep his office at the seat of government, and shall keep a complete record of all the proceedings of the supreme court"

Revsd. Political Code, Sec. 630.

"When the opinions of the supreme court are filed and the minutes thereof entered by the clerk, the reporter may take and retain the same * * * * * for such reasonable time as he may require to prepare the report thereof, when they shall be returned to and remain in the office of the clerk."

Revsd Political Code, Sec. 634.

The opinions of the supreme court are treated as its decisions. It will be noticed that in the second opinion in this case the court refers to its first opinion as its "decision"; "an extended statement of the facts will be found in our former decision, wherein it is held that notices of forfeiture addressed to Rufus Wilsey, etc., were sufficient in form." (Trans. p. 21, fol. 40.)

"In all cases the supreme court shall remit its judgmen or decision to the court from which the appeal or writ of error was taken, to be enforced accordingly."

Revsd. Code, Civ. Procedure, Sec. 464.

"All state reports published by said reporter under

this article shall be considered and received in all courts of this state as evidence of the decisions of the supreme court."

Revsd. Political Code, Sec. 644.

From the foregoing quotations it is apparent: (1) That opinions of the supreme court of South Dakota are required by law to be filed with the clerk and retained by him as a part of his official records; and (2) That the opinion of the court is treated, not only by custom, but by statute, as its decision, and is made by statute legal evidence of such decision.

(B)

Both parties to this action claim title under the United States statutes (Sections 2319 and 2324); the plaintiffs in error under the statute as a whole, the defendants under that portion dealing with the forfeiture of the interests of a delinquent co-owner.

The determination of the controversy depends upon the interpretation or construction of this forfeiture provision. If it is construed in one way, plaintiffs' title is sustained; if the other, plaintiffs' title is defeated, and at the same time defendants' title is thereby established. No question of state or local law intervenes; it is solely and purely a question of Federal law, depending entirely upon the proper construction of a Federal statute.

Plaintiffs' title is not merely deraigned through or from the United States. It is true it depends upon a Federal statute in the first instance for its source; but more important than that it depends for its maintainance and continued existence upon the proper construction of that statute. It is not a question solely of whence was the title derived, but when and how is it divested?

Is it divested by a notice addressed to one deceased? Is it divested by an eighty-five days publication of forfeiture notice? If it is, then a title claimed under a United State statute is lost by reason of a particular construction of that statute; whereas it would have been maintained by the opposite construction. The United States statute vests title in the plaintiffs in error until a certain contingency; upon the happening of that contingency plaintiffs' title is divested. The question as to whether under the statute that contingency has happened is certainly a Federal question; if it is decided that the contingency has happened and the title divested, it is manifestly a decision adverse to a claim of title under a statute of the United States. Plaintiffs in error claim that title under a Federal statute is still in them, despite certain forfeiture proceedings; defendants in error claim such title has been divested thereby. Is a decision adverse to plaintiffs' claim any the less against their title because that decision is favorable to defendants' claim? Certainly not, since both parties are claiming under a Federal statute.

That which gives a semblance of reason to defendants' contention is the fact that plaintiffs' divestiture of title necessarily results in defendants investiture of the same title. If this were not the case, and if defendants' interpretation of the statute simply resulted in defeating the title of plaintiffs in error, and in forfeiting it to the United States, there would be no question but what plaintiffs in error had claimed a title under a statute of the United States, and that the decision of the state court had been adverse to such title. The decision of the question in this case is twofold in its effect; it first defeats plain-

tiffs' claim of title; it then vests that title in the defendants. The fact that it is in its effect favorable to defendants in error does not make it any the less adverse to plaintiffs. Plaintiffs have lost their title by reason of the adverse construction of a Federal statute just as truly as though defendants in error had not gained that title; just as truly as though plaintiffs' title had been forfeited to the United States instead of to the defendants.

The case of DeLamar's Gold Mining Company v. Nesbitt, 177 U. S., 523; 20 Supreme Court Reporter, 715 which is relied upon by defendants in error does not hold to the contrary. In that case the crucial question was whether the Nesbitt Brothers had such an interest in the "Fraction" mine as would enable them to claim the benefit of the acts of Congress dispensing with the necessity of annual representation work for the years 1893 and 1894 (28 Stat. At L., 6 Chap. 12 and 114 Chap. 142.) This question depended solely upon the effect of certain execution sales under which the Nesbitts supposed they had acquired title. These sales and the judgments of justice courts of the state on which they were based were held void by the state court; which held nevertheless that under the circumstances the Nesbitt Brothers, with their co-tenant, Borth, had such an interest in the "Fraction claim as enabled them to take advantage of the acts in question, and thereby save a forfeiture of their mining location. The effect of this holding was necessarily adverse to the mining company and the validity of its mining location; but the adverse effect was due primarily to the decision of the local question though the acts of Congress and their application were incidentally also involved. In other words, the controversy really hinged

on the effect of the execution sale proceedings under which the Nesbitt Brothers claimed title, which was a matter entirely of local law and involved no Federal question. This is manifestly the view taken by this Court, for it says: "No Federal question was presented by the pleadings in the case and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which the Nesbitt Brothers had acquired the interest of De Beque and Stevens in the Fraction mine." And again: "Except so far as the case under consideration required a construction of the above mentioned acts of Congress suspending the forfeiture of mining claims, the questions were purely of a local nature and not subject to review in this court."

DeLemars Co. vs. Nesbitt, 177 U. S. 523, 20 Sup. Ct. Rep. 717.

This DeLamar case would support the contention of defendants in error if the plaintiffs in error were seeking to defeat defendant's title by reason of state law, as the DeLamar Company was seeking to defeat Nesbitts' title by reason of the invalidity of the execution sale proceedings had under state court judgments. If the plaintiffs in error in this case were claiming under some state statute while the defendants claimed under the forfeiture proceedings prescribed by the United States statute (section 2324) then a decision for defendants manifestly would oust this Court's jurisdiction. Not so, however where both parties claim under varying constructions of a Federal statute.

The case at bar falls squarely within the general rule announced in the DeLamar case: "To raise a Fed-

eral question the right must be one claimed under a particular statute of the United States, the validity, construction, or applicability of which was made the subject of dispute in the state court; and the decision on such statute must have been adverse to the plaintiffs in error."

II.

(A)

Upon the merits defendants in error suggest that the question decided by the first opinion of the State Supreme Court as to the form of the notice of forfeiture is not before this Court because this writ of error was not sued out on the former judgment of that Court.

A writ of error could not have been sued out on that judgment because it was not a final judgment, but remanded the case for further proceedings in the lower court.

And again, the second opinion of the court not only refers to, but necessarily adopts, the first opinion; since the second opinion could not have been maintained without impliedly, if not expressly, re-asserting the proposition determined by the first, viz, that the notice of forfeiture in question was sufficiently addressed. The state supreme court in its opinion on the second appeal says: "An extended statement of the facts will be found in our former decision wherein it is held that notice of forfeiture addressed to Rufus Wilsey etc. were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual for the reason that they were not published during the entire period prescribed by the Federal statute." etc. (Trans. p. 21, fol. 40.)

It is clear that in affirming the lower court's judgment the supreme court of the state determined: (1) That the notices of forfeiture in question were sufficiently addressed, and (2) That they were published for a sufficeint length of time. Both of these propositions were actually and necessarily determined in the opinion of the state supreme court.

(B)

The difference between the notice required by United States Revised Statutes, section 2324 to be given a delinquent co-owner, and that required by section 2325 to be given of an application for patent is that the former is expressly required to be given to a definite person, to-wit: "The co-owners may * * * * * give such delinquent co-owner personal notice in writing or notice by publication" etc., whereas in the latter case the notice is general and required to be given to no one in particular, to-wit: "The Register of the Land Office * * * * * shall publish a notice that such application has been made." etc.

The same is true with reference to the South Dakota statute for the foreclosure of mortgages by advertisement The notice is general and not special; is meant for all the world and not for any one individual; as the supreme court of the state itself says: "By the statute of this state no notice of sale is required to be served upon anybody; general notice to all interested is given by publication; there are no parties to the proceeding as in an action for foreclosure."

Reilly v. Phillips, 4 S. D., 640; s. c. 57 N. W. Rep., 780.

Immediately upon the death of Rufus Wilsey it is

conceded that his heirs became the owners of his half interest in the "Golden Sands" claim; they thereby became co-owners in that claim with C. H. Havens. The question as to whether notice "to Rufus Wilsey, his heirs, administrators, and to all whom it may concern" is sufficient as a notice to those heirs under the Federal statute which requires that such delinquent co-owner be given personal notice in writing or by publication is sufficiently discussed in our original brief. So also is the question as to the publication of the notice.

Respectfully,

EBEN W. MARTIN,

NORMAN T. MASON,

Attorneys for Plaintiffs in Error.

Deadwood, South Dakota, April, 1904.